first visit. According to the appellant, the symptoms described could be attributed to pregnancy, and part of the examination carried out by him was directed to discover whether the complainant was pregnant.

According to the complainant it was during this second visit that the appellant committed the offence with which he was charged. The complainant's evidence was to the effect that after the nurse had left the cubicle, the appellant made her lie down crosswise on the bed and had sexual intercourse with her.

Counsel for the appellant has demonstrated to this court that having regard to the width of the bed it was virtually impossible for the appellant to have committed the act in the way described by the complainant. As to the complainant's evidence the record shows that she contradicted herself on numerous occasions. In the circumstances, it is not surprising that in his grounds of judgment the learned trial judge stated that if the complainant's evidence alone were the evidence on which he could make a finding in the case he would have no hesitation in holding that the complainant's evidence was completely unreliable.

Having in effect found that the complainant's evidence was completely unreliable, the learned trial judge in later passages of his grounds of judgment deals with what he refers to as extraneous evidence relating to the conduct of the appellant after the complainant's second visit to his clinic. The record shows that as a result of what the complainant told her mother, the complainant's parents and her brother went to see the appellant at various times in order to complain about his behaviour towards her. The Chairman of the Kampong Koh Local Council was brought into the matter. After several discussions, the last of which took place after 8.30 p.m. on the 9th April 1963, the appellant agreed to pay the sum of $10,000 to the complainant's family. He drew three cheques, the first of which was for $4,000, the second for $3,000 and the third for $3,000. All these cheques were handed to the Chairman. During the discussions with the appellant, mention had been made of the fact that the complainant's brother was a man who was capable of resorting to violence to attain his ends. According to the Chairman, the appellant was prepared to pay the sum of $10,000 as compensation for the wrong he had done to the complainant. However, the appellant stated in evidence that he was prepared to make the payment for two reasons: first, because he wanted to avoid the publicity of a trial which would ruin his practice and secondly, because there was a threat of personal injury to him.

It cannot be doubted that when a medical practitioner has to stand trial on a charge of raping his patient, whether the charge be true or false, the attendant publicity may ruin his reputation and his practice. A medical practitioner may prefer to pay a sum of money, even though he has been falsely accused of rape, rather than face the ordeal and publicity of a trial. When the appellant handed the three cheques to the Chairman of the Local Council, he was doing what may be described as an equivocal act, which was capable of more than one interpretation. It may well be that he handed the cheques over in order to avoid publicity and the danger of having violence done to his person. Having regard to the fact that the complainant's evidence was in effect found to be completely unreliable, we are of the view that it was not safe to rely on the conduct of the appellant after the alleged incident in his clinic in order to reach the conclusion that he was guilty of the offence with which he was charged.

The complainant was a young girl who had just reached the age of puberty. It is not improbable that she was sexually stimulated as a result of the palpation of her breasts and the examination of her vagina. When the numerous contradictions in her evidence are considered it is difficult to resist the conclusion that an element of fantasy has crept into her version of the incident.

For the reasons which we have stated, the appeal is allowed. The conviction is quashed and the sentence set aside.

Appeal allowed.

Solicitors: *Abishegan-Naden & Co.*

TEAY WAH CHEONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 8, 1963]

[Kuala Trengganu — Criminal Appeal No. 11 of 1963]

Penal Code, s.304A—Causing death by rash or negligent act—Report by medical officer—Identity of deceased —Identity to be conclusively proved—High degree of negligence necessary.

Criminal Procedure—Part heard case—Continuance by new President of Sessions Court—Risk in such continuance—Criminal Procedure Code (Cap. 6), s.261

In order to sustain a conviction under section 304A of the Penal Code in the case of a road accident, the prosecution must conclusively prove the identity of the deceased person and that the accused acted with a high degree of negligence. A mere error of judgment on the part of the accused does not amount to gross negligence.

Observations on the danger of acting under section 261 of the Criminal Procedure Code.

CRIMINAL APPEAL.

Ten Chin Yong for the appellant.

Abdul Hamid bin Haji Omar (Deputy Public Prosecutor) for the respondent.

Hashim J.: The accused was charged under section 304A of the Penal Code. He was found guilty, convicted and sentenced to two weeks imprisonment and fined $500 in default five months

imprisonment. His driving licence was endorsed and he was disqualified from driving for three months from the date of conviction and sentence. He appealed against conviction and sentence.

I allowed the appeal on the following grounds:—

(a) The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to the hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam's name. The medical officer stated *inter alia* that the "patient died at 10.30 a.m. the same day" and "I handed the deceased to his relative on same day". In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have stated clearly that he personally saw the dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this "relative" was. The wife of Abdul Salam simply stated that she accompanied her husband to the hospital with the police and she identified her husband to the police on the same day the husband died.

(b) The prosecution failed to prove the high degree of negligence which is essential to sustain a conviction under section 304A of the Penal Code. From the evidence it would appear that the stretch of road where the accident took place was straight. There was no other traffic at that time. The deceased was cycling with a basket hanging on the handle of the bicycle. It was a dry and clear day. The car driven by the accused was travelling at a normal speed. From the photograph it would appear that the impact was at the crown of the road. The only damage to the car was that its front rear side mudguard was grazed and the rear view mirror mounted on the front rear side mudguard was broken. The overall picture one gets from the recorded evidence was that either the cyclist grazed against the car or the car grazed against the cyclist when it was on the point of overtaking the cyclist. It could even be an error of judgment on the part of the motorist but certainly not of gross negligence.

Finally, may I point out the danger of acting under section 261 of the Criminal Procedure Code. In this case a President of the Sessions Court recorded evidence of eight witnesses. He was then succeeded by the present President of the Sessions Court. The present President recorded further evidence and came to a finding. In his grounds of judgment the learned President stated there was in fact only one eye-witness to the accident, presumably the wife of Abdul Salam whose evidence was recorded by the present President. However the whole record shows there were two other eye-witnesses whose evidence was recorded by the former President. Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case *ab initio* rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor *vis-a-vis* the credibility of the witness.

I allowed the appeal and set aside the conviction and sentence.

Appeal allowed.

Solicitors: *Y. S. Lee & Co.*

KHOO KAY JIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) December 9, 1963]

[Penang — Criminal Appeal No. 19 of 1963]

Penal Code, s.417—Cheating—Cash transaction—Post-dated cheques given for goods—Cheques not met on presentation—Whether offence of cheating committed.

Criminal Procedure—Charge—Cheating—No specification of deception—No evidence that complainant induced by deception—Whether defective.

Deception is only one element of the offence of cheating. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception and which commission or omission caused or was likely to cause him some harm or damage in body, mind, reputation or property.

The giving of a post-dated cheque in lieu of money due with the knowledge that the drawer had no funds in the Bank does not amount to an offence of cheating in the absence of evidence to show that the person to whom the cheque was issued parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. A post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence.

A charge for cheating is defective if it does not specify the deception which has been practised.

In this case, as the goods were delivered and payment was due on August 15, 1962, in accepting the post-dated cheques on August 18, 1962, the complainant was in no worse position than he had been after the delivery of the goods on August 18 1962, and accordingly he could not be said to have sufferred any damage as a consequence of anything done on August, 18, 1962.

Cases referred to:—

(1) *Tan Peng Aun* v. *Public Prosecutor* [1949] M.L.J. Supp. 10.

(2) *Lim Chin Huat* v. *Regina* [1963] M.L.J. 314.

(3) *Ratra* v. *Ganesh Dass* A.I.R. 1940 Lah. 93.

(4) *Chidambaram Chettiar* v. *Shanmughan Pillai* A.I.R. 1938 Mad. 129.

CRIMINAL APPEAL.

Eusoffe Abdoolcader (*Tan Lye Huat* with him) for the appellant.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was convicted in the Magistrate's Court at Penang of an offence of cheating under section 417 of the Penal Code and was sentenced to a term of nine months' imprisonment. From this conviction and sentence the appellant appealed.